No. 83645-1

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

TACOMA NEWS, INC., d/b/a
THE NEWS TRIBUNE,

Petitioner,

vs.

THE HONORABLE JAMES D. CAYCE,
KING COUNTY JUDGE,

Respondent.

RESPONDENT MICHAEL HECHT'S RESPONSIVE BRIEF

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I. ASSIGNMENTS OF ERROR

1. The court correctly determined that the preservation deposition of a material witness was part of a closed proceeding.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a pre-trial preservation deposition is a hearing open to the public? (Assignments of Error 1).

III. STATEMENT OF THE CASE

Michael Hecht adopts the newspaper's recitation of the facts with the exception of classifying the proceeding as an open court proceeding. The News Tribune mischaracterizes the proceeding as a "court hearing" and demanded that the trial court provide a copy of the pretrial deposition to it prior to trial on this matter.

IV. ARGUMENT

1. THE COURT SHOULD DENY THE REQUESTED RELIEF IN THIS MATTER BECAUSE NEITHER THE PRESS NOR THE PUBLIC HAS A RIGHT TO BE PRESENT DURING PRETRIAL DISCOVERY MATTERS.

The defense does not dispute that in Seattle Times Company v. Ishikawa, 97 Wn.2d 30, 64 P.2d 716 (1982), this court held that before closure or access to a trial is ordered, the court must go through a specific process and ultimately weigh the competing interest as to whether a trial should be open or closed. Indeed, the defense has not waived its right to have an open trial in this matter, nor can anyone waive the public's interest in an open trial.

However, this court has also differentiated between open trials and the pretrial discovery

that occurs prior to trial. As this court noted in Rufer v. Abbott Laboratories, 154 Wn.2d 530, 541 114 P.3d 1182 (2005), Article I § 10 of the Washington Constitution "'does not speak'" to the disclosure of information surfacing during pretrial discovery that does not otherwise come before the court because 'it does not become part of the court's decision- making process'." (*quoting* Dreiling v. Jain, 151 Wn.2d 900, 909-10, 93 P.3d 861 (2004).) In Rufer, this court noted at this juncture there is no "public right of access with respect to these materials." Id.

Moreover, as the court further noted, CR 26(c) provides:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of

> the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that the contents of a deposition not be disclosed or be disclosed only in a designated way; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Id. at 541, fn 4[1]. All of the cases which address the constitutional guarantee to public access to the judicial process have addressed documents filed for purposes of litigation. See e.g., Ishikawa, supra (access to motions, and supporting documents, filed and argued in court), Rufer, supra (access to trial exhibits and depositions used at trial), Dreilling, supra (access to documents filed in court as part of motion to terminate).

However, not a single case allowed access to discovery occurring prior to trail and not filed as part of a dispositive motion or used in court.

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[1] This rule is addressed to the parties should there be a dispute as it relates to discovery. Here, both parties object to the release of the deposition.

As noted in Dreiling, there are good reasons to distinguish between dispositive motions and discovery. Civil rules allow for discovery to be sealed as it may not become part of the decision making process. Further, Article I § 10 does not speak to its disclosure. 151 Wn.2d at 909-910.

The status of pretrial discovery only changes if it becomes attached to a summary judgment motion and implicates the public's right to open hearings just like a full trial. Id.

Here, nothing has occurred which changes the status of the deposition. It has not been made a part of any proceeding or motion. The deposition has not been part of the trial court's decision making process and unless it's attached to a motion and/or used at trial, it has yet to become a part of a full trial implicating Article I § 10 of the Washington Constitution. It is only at that time that the documents are subject to the public's access and may only be sealed based on an overriding interest requiring secrecy, with the burden on the proponent. Id. at 910 (*citing* Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 252 (4th Cir. 1988).) Thus, the safeguards

set forth in Ishikawa do not even apply in this situation.

Not surprisingly, the United State Supreme Court has recognized the difference between the constitutional presumption of open trials and closed discovery proceedings in a case originating out of this state. See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). In Rhinehart, the Court, in holding there is no First Amendment right to access of pretrial discovery, stated

> ...pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law.

467 U.S. at 33.

As further noted by the Court:

> Discovery rarely takes place in public. Depositions are scheduled at times and places most convenient to those involved. Interrogatories are answered in private. Rules of Civil Procedure may require parties to file with the clerk of the court interrogatory answers, responses to requests for admissions, and deposition transcripts. See Fed. Rule Civ. Proc. 5(d). Jurisdictions that require filing of discovery materials customarily provide that trial courts may order that the materials not be filed or that they be filed under seal. See *ibid.*; Wash. Super. Ct. Civ. Rule 26(c). Federal

> District courts may adopt local rules providing that the fruits of discovery are not to be filed except on order of the court. See, e.g., C. D. Cal. Rule 8.3; S.D.N.Y. Civ. Rule 19. Thus, to the extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court.

Id. at 33, fn 19.

In Rhinehart, the Supreme Court upheld the State Supreme Court's decision, wherein this court stated:

> ...by undertaking the lawsuit, the plaintiff necessarily consented to the exposure of all relevant evidence admissible and admitted at trial, which will then be a matter of public record and available for publication by the defendants or any other person. But until and unless the fruits of the discovery are made public through the judicial process, (or by the plaintiffs or others independently of discovery), plaintiff's are entitled to the protection of the court.

Rhinehart v. Seattle Times, 98 Wn.2d 226, 257, 254 P.2d 673 (1982). (emphasis added)

While the underlying action here is a criminal proceeding, the same analysis applies. See Ishikawa, supra, the constitutional protections of open hearings are not infringed upon by denying access to a compelled discovery deposition in a criminal case, which may or may

not be used during the actual trial in this action[2].

V. CONCLUSION

Based upon the files and records herein, defendant has no objection to the release of the deposition at this juncture, but requests, that the court deny the requested relief and hold that the trial court did not violate state or federal laws.

RESPECTFULLY SUBMITTED this 12th day of January, 2010.

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[2] As stated in Rhinehart, once the deposition was to be used in open court, then it would become part of the public record that the newspaper would then be allowed to access. It, in fact, was in part, used in court and thus defendant has no objection to its release at this juncture.

CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of respondent, Michael Hecht's responsive brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington this 12th day of January, 2010.

Lee Ann Mathews

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Attached please find for filing Mr. Hecht's reponsive brief. Thank you.
<<hecht responsive brief.pdf>>

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